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ASIO Security Assessments and eligibility for a  
protection visa

*Submission on the Migration Amendment Bill 2013*

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## About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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# 1. Introduction

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## 1.1 Background

1. The *Migration Amendment Bill 2013* (Cth) (**the Bill**) has been referred to the Legal and Constitutional Affairs Legislation Committee for inquiry and report. The Committee has invited submissions.
2. This submission by the Human Rights Law Centre (**HRLC**) addresses a number of human rights concerns raised by the proposed amendment to section 36 of the *Migration Act 1958* (Cth) (**Migration Act**) to insert a new criterion for the grant of a protection visa. The proposed amendments, contained in Schedule 3 of the Bill, require that in order to be granted a protection visa, a person must not be assessed by ASIO to be a risk to security within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**).

## 1.2 Executive Summary

3. The HRLC has the following concerns about the proposed reforms making eligibility for a protection visa contingent on the outcome of the ASIO Security Assessment process:
  - (a) Adverse ASIO Security Assessments issued in respect of protection visa applicants are, and would continue to be, non-reviewable and made through a process lacking procedural safeguards. The rights of protection visa applicants would thus be unduly dependent on non-reviewable and secretive administrative decisions.
  - (b) A refugee who receives an adverse ASIO Security Assessment may be indefinitely detained. The proposed reforms do not contain adequate procedural checks and balances to ensure such detention is not arbitrary and in violation of article 9 of the International Covenant on Civil and Political Rights (**ICCPR**).
  - (c) The new eligibility criterion would introduce a wider basis for refusing the grant of a protection visa than the grounds set out in the Refugee Convention. It would provide a basis under domestic law to deny protection to those entitled to it under international law, and therefore place Australia at risk of violating the Refugee Convention.
  - (d) The proposed amendments fail to address longstanding and repeated criticisms, made by various domestic and international human rights bodies, of the ASIO Security Assessment process as it applies to refugees in Australia.
4. The HRLC makes the following recommendations:

**Recommendation 1:**

Applicants for protection visas should be afforded the same legal right as citizens and permanent residents to seek merits review of ASIO security assessments in the Administrative Appeals Tribunal.

**Recommendation 2:**

There should be legislative provision for regular (i.e. at least 6 monthly) consideration of whether the deemed security threat posed by a person can be addressed in manner less harmful and restrictive than detention.

**Recommendation 3:**

The national security grounds on which a protection visa may be refused should be confined to the exclusion grounds under the Refugee Convention.

## 2. Absence of procedural safeguards

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5. Schedule 3 of the Bill amends section 36 of the *Migration Act* to insert a specific criterion for the grant of a protection visa that the applicant not receive an adverse ASIO Security Assessment.
6. There is currently no valid criterion under the *Migration Act* or the *Migration Regulations* requiring an applicant to satisfy an ASIO Security Assessment before being granted a protection visa<sup>1</sup>. The Australian Government had previously attempted to introduce such a criterion as public interest criterion 4002 in Schedule 1 of the *Migration Regulations* (**PIC 4002**), but this regulation was declared invalid by the High Court of Australia in the case of *Plaintiff M47/2012 v Director General of Security & Ors*<sup>2</sup>. The Bill will insert in the *Migration Act* a new section 36(1B) in the same terms as PIC 4002.
7. This proposed criterion is thus an additional statutory basis on which a person found to be a refugee can be refused a protection visa. As acknowledged in the Explanatory Memorandum to

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<sup>1</sup> Section 500 and the character test in section 501 allow the Minister to refuse or cancel a protection visa on specific national security grounds, but there is no express reference to an ASIO Security Assessment in these provisions.

<sup>2</sup> (2012) 292 ALR 243 (*Plaintiff M47*).

- the Bill, a negative Security Assessment can also result in a refugee's indefinite detention if they cannot be returned to their country of origin and cannot be sent to a third country<sup>3</sup>.
8. Given the consequences that can flow from an adverse ASIO Security Assessment, it is vital that they be made through a process that is fair, transparent and reviewable. It is therefore of great concern that the Bill gives the ASIO Security Assessment process heightened relevance while at the same time confirming its secrecy and non-reviewability.
  9. The HRLC is particularly concerned that the Bill fails to provide a person adequate review avenues in the event that an adverse ASIO Security Assessment is made.
  10. While judicial review of an adverse ASIO Security Assessment or of a decision not to grant a protection visa based on such an assessment is technically available, its practical utility may be negligible as there is no requirement to give the individual affected a copy of the Security Assessment or the reasons for it<sup>4</sup>.
  11. The Bill also expressly excludes decisions to refuse or cancel protection visas on security grounds from review by the Refugee Review Tribunal (**RRT**)<sup>5</sup>. Further, while Australian citizens and permanent and special purpose visa holders are able to seek merits review of adverse ASIO Security Assessments in the Administrative Appeals Tribunal (**AAT**), protection visa applicants cannot<sup>6</sup>.
  12. The Explanatory Memorandum refers to "arrangements... in place for independent review of the initial issue of and continuing need for an adverse security assessment."<sup>7</sup> This is presumably a reference to the Independent Reviewer of Adverse Security Assessments, (**the Stone review**), which was introduced in December 2012.
  13. The Stone review does provide some limited oversight and review of adverse security assessments and is an important step towards increased transparency and accountability of a category of decision that has profound consequences for the individuals subject to them. However, it is a non-legislative, non-binding process, operating solely as a matter of policy. The outcomes of the independent review are not binding. The review process does not allow

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<sup>3</sup> Statement of Compatibility with Human Rights, Attachment A to the Explanatory Memorandum, Migration Amendment Bill 2013 (Cth) (**Statement of Compatibility with Human Rights**), p 9.

<sup>4</sup> *Parkin v O'Sullivan* (2006) 162 FCR 444; section 36, *Australian Security Intelligence Organisation Act 1979* (Cth), which provides that section 37 does not apply to non-citizens who do not hold permanent or special purpose visas; see also reference to this point made by Professor Ben Saul, quoted in Joint Select Committee on Australia's Immigration Detention Network, Final Report, April 2012 at para 6.109(iv).

<sup>5</sup> Proposed sections 411(c)(ii) and 411(d)(ii).

<sup>6</sup> Sections 37 and 54, *Australian Security Intelligence Organisation Act 1979* (Cth). These sections do not apply to non-citizens pursuant to section 36.

<sup>7</sup> Statement of Compatibility with Human Rights, p 10.

the individual concerned information about the basis for their adverse security assessment, and therefore does not adequately permit the person to make submissions on the content of the assessment. The Stone review is inferior to the review process available to citizens and permanent residents who have received adverse security assessments and are able to seek binding merits review in the AAT.

14. The stakes are higher for protection visa applicants, yet their procedural rights are significantly fewer. Rather than addressing this fundamental inequality before the law, the proposed reforms further entrench it.

**Recommendation 1:**

Applicants for protection visas should be afforded the same legal right as citizens and permanent residents to seek merits review of ASIO security assessments in the Administrative Appeals Tribunal.

### 3. Potential for arbitrary detention

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15. The Statement of Compatibility with Human Rights attached to the Explanatory Memorandum acknowledges that a consequence of the proposed amendment to section 36 of the *Migration Act* may be the indefinite detention of a protection visa applicant found to be a refugee but deemed a security risk by ASIO<sup>8</sup>.
16. Indefinite detention in such circumstances risks being arbitrary and in violation of Australia's international human rights obligations, particularly article 9 of the ICCPR. The United Nations Human Rights Committee and the United Nations Working Group on Arbitrary Detention have both confirmed that detention for national or public security purposes will be arbitrary and incompatible with international human rights law in the absence of effective judicial oversight and review<sup>9</sup> or without information as to the reasons for the decision being given and court control of the detention<sup>10</sup>.
17. The Human Rights Committee has further held that article 9(2) of the ICCPR requires that a State must provide a person with substantive reasons for their arrest (which is not limited to arrest in relation to criminal charges)<sup>11</sup>, or detention on the basis of public security<sup>12</sup>.

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<sup>8</sup> Statement of Compatibility with Human Rights, p 9.

<sup>9</sup> *Report of the Working Group on Arbitrary Detention*, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].

<sup>10</sup> UN Human Rights Committee, General Comment 8 (1982) at [1] and [4].

<sup>11</sup> HRC, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) (*F.K.A.G v Australia*) at [9.5].

18. As noted in Part 2 above, the HRLC is concerned that the Bill introduces an ASIO Security Assessment statutory criterion for the grant of a protection visa without providing for merits review of either the Assessment, or of the decision to cancel or refuse a visa on the basis of it.
19. Detention of a refugee following an adverse assessment risks violating article 9 of the ICCPR as there are insufficient effective judicial oversight and review mechanisms.
20. Detention may also be arbitrary in violation of article 9 where it is disproportionate in light of the circumstances at the time<sup>13</sup>. The United Nations Human Rights Committee has stated that where there are less intrusive measures than detention, they should be used<sup>14</sup>. Similarly, the Australian Human Rights Commission has previously found that the Department of Immigration's failure to adequately consider less restrictive forms of detention or alternatives to detention for detained individuals who had been given adverse ASIO Security Assessments constitutes a breach of article 9(1)<sup>15</sup>.
21. Despite these clear findings from domestic and international human rights bodies, the Bill does not require the consideration of alternatives to immigration detention for each person who has been refused a visa based on the security assessment criterion. As such, the HRLC is concerned that the Bill does not contain any measures to prevent similar violations of article 9(1) occurring in the future.

**Recommendation 2:**

There should be legislative provision for regular (i.e. at least 6 monthly) consideration of whether the deemed security threat posed by a person can be addressed in manner less harmful and restrictive than detention.

## 4. Widening grounds for refusal of protection

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22. The Bill introduces into the *Migration Act* a basis for refusing the grant of a protection visa that is wider than the grounds for refusing protection set out in the Refugee Convention.
23. Articles 1F, 32 and 33(2) of the Refugee Convention set out the grounds on which a State Party may validly refuse an individual protection. Article 32 of the Refugee Convention allows

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<sup>12</sup> *Ibid.* at [4]. See also *Drescher v Uruguay* [1983] UNHRC 19, UN Doc CCPR/C/19/D/43/1979 (21 July 1983) at [13.2].

<sup>13</sup> See *A v Australia*, HRC, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) at [9.2]; *F.K.A.G. v Australia* at [9.3] – [9.4].

<sup>14</sup> *F.K.A.G. v Australia* at [9.4].

<sup>15</sup> Australian Human Rights Commission, *Sri Lankan refugees v Commonwealth of Australia* [2012] AusHRC 56, p 18, available at <http://www.humanrights.gov.au/sites/default/files/content/legal/humanrightsreports/AusHRC56.pdf>

expulsion of a refugee on the grounds of “national security or public order”. Article 33(2) provides that refugees who are a danger to the security of their host country may not be able to benefit from the *non-refoulement* protections under Article 33(1) to avoid being sent back to their country of origin.

24. The concept of being “directly or indirectly a risk to security” which the Bill proposes to insert in section 36 has a broader scope than these exclusion grounds due to the wider definition of “security” in section 4 of the *ASIO Act*, a circumstance recognised by the High Court of Australia<sup>16</sup>.
25. The HRLC is concerned that if enacted, the Bill may exclude from protection individuals who Australia is obliged to protect under the Refugee Convention. As such, the proposed amendments are potentially incompatible with Australia’s obligations under the Refugee Convention.
26. In order to be compliant with Australia’s international law obligations, the ‘national security’ grounds on which a protection visa may be refused should be confined to the ‘exclusion’ grounds under Articles 1F, 32 or 33(2) of the Refugee Convention. The *Migration Act* in its current form already authorises the Minister to refuse or cancel a visa on the basis of these ‘exclusion’ grounds<sup>17</sup>. No justification has been provided in the Bill or in the Explanatory Memorandum for the need to expand the grounds of exclusion beyond those in Articles 1F, 32 or 33(2) of the Convention.

**Recommendation 3:**

The grounds on which a protection visa may be refused should be confined to the exclusion grounds under the Refugee Convention.

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## 5. Failure to implement recommendations and address human rights violations

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27. The proposed amendments fail to address longstanding and repeated criticisms, made by various domestic and international human rights bodies, of the ASIO Security Assessment process as it applies to refugees in Australia.
28. The HRLC is concerned that rather than addressing the systemic defects raised by these bodies, the Bill would further entrench them in legislation.

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<sup>16</sup> *Plaintiff M47*, at [71] per French CJ and at [126] per Hayne J.

<sup>17</sup> See Section 500(1)(c), *Migration Act*.



## 5.1 Joint Select Committee on Australia's Immigration Detention Network

29. The Joint Select Committee on Australia's Immigration Detention Network issued a *Final Report* in March 2012 following a request to examine certain aspects of immigration detention<sup>18</sup>. The Committee raised significant concerns about the ethical and moral implications of issuing a security assessment which indefinitely removes liberty without disclosing evidence of the justification for such an assessment<sup>19</sup>.
30. The Committee noted that some refugees had been permitted to live in the community despite adverse Security Assessments, and concluded that "ASIO is able to discern varying levels of risk posed by individuals with adverse security assessments"<sup>20</sup>.
31. The Committee ultimately recommended that the Government take immediate steps to resolve how to afford refugees an opportunity to appeal the grounds of their adverse security assessment, and therefore indefinite detention, without compromising national security. The Committee stated that it could see "no compelling reason to continue to deny non-residents the same access to procedural fairness" as Australian residents, who can apply for merits review of an adverse security assessment<sup>21</sup>.
32. The HRLC reiterates its strong support for this recommendation.

## 5.2 UN Human Rights Committee decision against Australia

33. In August 2013, the United Nations Human Rights Committee found that Australia had breached the ICCPR by indefinitely detaining 46 refugees subject to adverse ASIO Security Assessments without adequate reasons, review rights or individualised consideration of less restrictive options for managing the risk they had been deemed to pose<sup>22</sup>.
34. Of particular concern were the Human Rights Committee's comments that:
- (a) Australia had not demonstrated on an individual basis that their continuous indefinite detention was justified or that less intrusive measures were unavailable, and that the

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<sup>18</sup> Available at:

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/immigrationdetention/report/~media/wopapub/senate/committee/immigration\\_detention\\_ctte/report/report\\_pdf.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/immigrationdetention/report/~media/wopapub/senate/committee/immigration_detention_ctte/report/report_pdf.ashx) (Accessed January 2014).

<sup>19</sup> Joint Select Committee on Australia's Immigration Detention Network, *Final Report*, March 2012, Chapter 6.

<sup>20</sup> *Ibid.* para 6.123.

<sup>21</sup> *Ibid.* para 6.150.

<sup>22</sup> *F.K.A.G. v Australia*.

refugees had been deprived of legal safeguards allowing them to challenge their indefinite detention, in violation of article 9(1)<sup>23</sup>;

- (b) the refugees had been provided with insufficient detail about the basis for their security assessments, in violation of article 9(2)<sup>24</sup>; and
- (c) there was no avenue for challenging the detention on the basis that it was incompatible with the ICCPR, in violation of article 9(4)<sup>25</sup>.

35. As discussed in Part 3, indefinite detention may occur where a person fails to satisfy the ASIO Security Assessment criterion introduced by the Bill. Such circumstances would be indistinguishable from the indefinite detention faced by the refugees in this case.
36. The Bill therefore creates a potential circumstance in which individuals' rights under article 9 of the ICCPR will be violated in the same or similar manner as that identified in the *F.K.A.G v Australia* case. The Bill affords a statutory footing to the ASIO Security Assessment process which underpinned the arbitrary liberty deprivation in the HRC case but does not introduce any safeguards to prevent further human rights violations.

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<sup>23</sup> Ibid. para 9.4.

<sup>24</sup> Ibid. para 9.5.

<sup>25</sup> Ibid. para 9.6.